



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 88 OF 2019 (O.S)

**ALPHONCE MWAMBO SANGA (suing in his capacity as the
personal representative of Sanga Mwambo Kai (deceased)PLAINTIFF**

VERSUS

TEBID HOLDINGS LIMITED.....1ST DEFENDANT

DISTRICT LAND REGISTRAR, KILIFI.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

By an Originating Summons dated 14th October 2019 the plaintiff herein sued the defendants seeking for the following orders:

- 1. That this Honourable Court do issue an order vesting the land parcel known as Plot No. CHEMBE/KIBABAMCHE/311 (hereinafter the suit property) in the names of the Plaintiff herein.***
- 2. That this Honourable Court do issue an order revoking/cancelling the title deed of the 1st Defendant and subsequently the District Land Registrar, Kilifi, be ordered to register the Plaintiff as proprietor of the suit property and issue him with a title deed in respect thereof.***
- 3. That costs be in the cause.***

The 1st Defendant never entered appearance despite being served, therefore, the suit proceeded by way of viva voce evidence in its absence. In response, the 2nd Defendant filed a Replying Affidavit sworn by Stella Gatuiri Kinyua on 19th February 2021.

PLAINTIFF'S CASE

PW1 reiterated the contents of his supporting affidavit sworn on 14th October 2021 whereby he stated that his late father, Sanga Mwambo Kai was the first squatter on the suit property since the year 1970.

PW1 testified that when the land was adjudicated, the suit property was allocated to one Benjamin Mungindo who surrendered the suit property to him as Benjamin was not a native of the area as evidenced by a letter dated 26th September 2016 to the National Land Commission.

It was also PW1's evidence that the suit property was never transferred from the first registered owner Benjamin Mungindo to Karisa Dhuri Kombe hence the registration of Karisa Dhuri Kombe as proprietor of the suit property was fraudulent.

PW1 stated that the transfer was fraudulent as there was no transfer instrument that was registered at the Lands Registry showing how Karisa Dhuri Kombe became proprietor of the suit property.

PW1 further stated that thereafter the National Land Commission conducted a ground verification exercise and public hearings and directed that the title to the suit property be issued to the PW1. PW1 also produced documents

It was PW1's testimony that on 20th September 2019, the District Land Registrar consequently advised him to get a court order for cancellation of the title issued to the 1st Defendant hence the present suit. PW1 produced documents namely, the adjudication record, official search, green card extract, letter dated 20th September from the Kilifi County Land Registrar informing the PW1 to get a court order for cancellation of the suit title, letter dated 7th December 2018 from the National Land Commission directing the Chief Land Registrar to issue a title deed in the name of the plaintiff.

The 2nd defendant did not give evidence but relied on the replying affidavit sworn by the Land Register which supported the facts that the plaintiff had stated about the suit property and the directions by the National Land Commission.

PLAINTIFF'S SUBMISSIONS

Both Counsel filed submissions in respect of the case and reiterated the evidence of the plaintiff together with the documents.

Mr. Otara submitted that the National Land Commission has correctly performed its function of reviewing grants or dispositions of public land to establish their propriety or legality as provided under section 14 of the National Land Commission Act which states as follows:

(1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

Counsel submitted that the National Land Commission has no jurisdiction to revoke titles even where it has established that the same were unlawfully or irregularly acquired and relied on the case of **Mwangi Stephen Muriithi v National Land Commission & 3 others [2018] eKLR** where Justice W. A. Okwany held as follows;

“As I have already noted in this judgment, Article 67 (2) (e) of the constitution provides that the functions of the National Land Commission include “to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.”

Article 68 (c) (v) of the Constitution empowers Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety. The legislation anticipated in this context is the National Land Commission Act No. 5 of 2012. The Act provides at Section 14 for the review of grants and dispositions, pursuant to Article 68 (c) (v) of the Constitution. The said section outlines the procedure for the review of grants and disposition of public land to establish their propriety and legality. Where the Commission under Section 15 of the Act finds that the title was acquired in an unlawful manner, the Commission shall direct the Registrar to revoke the title.

I find that there is no provision empowering the Commission to revoke titles even where it is established that the same were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend.”

Counsel therefore urged the court to find that the Plaintiff has proved his case on a balance of probability and grant the prayers sought with costs.

2ND AND 3RD DEFENDANTS' SUBMISSIONS

Counsel for the 2nd and 3rd defendants gave a chronology of the records that the defendant has at the land Registry and stated that the 2nd Defendant has provided accurate information on the suit property as custodian of the said documents in order to assist the court arrive at a just conclusion before making a final determination.

Counsel relied on Section 80 of the Land Registration Act which empowers the court to rectify a register.

ANALYSIS AND DETERMINATION

This is a straight forward case which should have not taken three years to be determined. The plaintiff's evidence and the documents that were produced are corroborated by the 2nd and 3rd defendants' replying affidavit which gave a chronology of the transactions on the suit land.

It should also be noted that the National Land Commission had also done investigations and directed the Chief Land Registrar to issue the plaintiff with a title deed in respect of the suit land but the same could not be done without a court order.

This is what the commission wrote:

“This is therefore to direct that the titled deed of Benjamin Mungindo is upheld. Any titles deeds issued subsequent to the adjudication titles are unlawful and the Chief Land Registrar is hereby directed to revoke the same, by this letter the restriction in respect of this property is hereby lifted

It is imperative to note that Benjamin Mugindo subsequently transferred his interest in the property to Alphonse Mwambo

Sanga. Therefore, the Chief Land Registrar is directed to issue title in favour of Alphonse Mwambo Sang ID No. 5033804 P.O Box 5449, Code 800200 Malindi .”

It is also on record that the Kilifi County Land Registrar vide a letter dated 20th September 2019 advised the plaintiff to move to court to obtain an order for revocation.

Section 26 (1) of the Land Registration Act, 2012 provides that unless there is proof of fraud or misrepresentation or that a certificate of title has been acquired illegally unprocedurally or through a corrupt scheme, a certificate of title is taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. That section provides:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a) ***on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b) ***where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.***

In **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** the court observed that where a registered proprietor’s title is challenged he or she must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances. The court held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

I have considered the pleadings, the evidence adduced and submissions by counsel and find that the plaintiff has proved his case on a balance of probabilities hence entitled to the reliefs sought.

Further, this court is clothed with the powers to make such orders to rectify the land register if satisfied that any registration was obtained by fraud or mistake. Section 80 of the Land Registration Act, 2012 provides:

Rectification by order of Court.

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

I therefore make the following specific orders:

1. *That a vesting order is hereby issued that land parcel known as Plot No. CHEMBE/KIBABAMCHE/311 be registered in the Plaintiff’s name.*
2. *That the District Land Registrar Kilifi is hereby directed to revoke/cancel the title deed in the 1st Defendant’s name and register the Plaintiff as proprietor of the suit property and issue him with a title deed.*
3. *1st Defendant to pay costs of the suit.*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 2ND DAY OF DECEMBER, 2021.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.